

Useful information for many sales tax questions can be found by reviewing the Department's regulations for these taxes at 86 Ill. Adm. Code Part 130 and Part 150. The Department's General Information Letters are also helpful for guidance in specific situations. (This is a GIL.)

June 7, 2006

Dear Xxxxx:

This letter is in response to your letter dated June 20, 2005, in which you request information. We apologize for the delay in responding. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.ILTAX.com](http://www.ILTAX.com) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

ABC has been retained by a firm in STATE to manage its sales and use tax liabilities. The company operations are outlined in the following letter. The company would like direction on how to collect/remit sales and use tax in Illinois. The company would prefer a written opinion including citations where applicable, and at minimum the best interpretation of the laws and regulations of the state. The company wishes to comply with all laws and regulations of the state in order to be a good corporate citizen and to keep tax revenue within the state.

The company is a Limited Liability Company pursuant to the laws of the STATE. The corporate offices are located in the STATE and all property owned or leased is located within the STATE. The company is a direct seller of nutritional products. The company product is a nutritional supplement in gel form, packaged in individual packets, with 30 packets to a box, currently sold for \$60. The company charges a \$35 enrollment fee for individuals to become independent contractors for the company. The company began sales in the state on May 02, 2005. The company is in the process of registering for the proper sales and use tax permit/license in the state.

The enrollment fee includes a company starter kit. The starter kit consists of marketing and recruiting materials and a box of company product. The marketing and recruiting materials consist of a CD about the company and printed brochures. These items are

used to explain the company compensation plan and other company benefits for potential and prospective recruits. These items will be available for purchase separate from the company products in the future, but are currently bundled at this time with the company products as a 'PRODUCT'.

The company sells a 'PRODUCT-1' for \$200 which includes 4 boxes of product and a starter kit; a 'PRODUCT-2' for \$600 which includes 10 boxes of product, a 'PRODUCT', and a starter kit; an 'Executive Pac' which includes 16 boxes of product, a 'PRODUCT' and a starter kit.

Shipping and handling is charged as a flat fee, based on the package shipped. Packages are shipped by common carrier.

1. What is the taxability of the nutritional product?
2. What is the taxability of the transaction when it consists only of boxes of company product?
3. What is the taxability of the transaction when it consists of bundled product and marketing materials?
4. What will be the taxability of the transaction when it consists solely of marketing materials?
5. Is the shipping and handling charge taxable?

The company may ship promotional items used as incentives when independent contractors meet specific company goals. These items may be company product and/or other tangible personal property. These items may also include vouchers for free admission to the company's annual convention or other company sponsored events throughout the country. These events may also include the admission of the general public. Currently, the company provides incentives such as travel vouchers, gift certificates, and other items purchased in STATE for use within STATE.

1. Does the company have a use tax liability for these incentive items? If not, does the independent contractor have a use tax liability?
2. If the company sponsors events in your state, is the admission to these events taxable?

The company projects that 99% of all independent contractors will purchase company product for their own use. The remaining 1% will purchase company product in order to resell the product. The company allows inventory to be carried by independent contractors but only in quantities that can reasonably be sold. Independent contractors are not allowed to carry excess inventory.

1. Is the company liable to collect and remit sales and use taxes collected by the independent contractors who resell the product? If not, how should the company handle these transactions?
2. Is an agreement required in your state for direct sellers to collect sales and use tax on behalf of its independent contractors?

The last issue that the company faces is the Streamlined Sales Tax Project. Considering the fact that the company is a direct seller of nutritional products, the impact of the SSTP complicates the current and future collection/remittance of sales and use tax. The company would like to reduce the impact of these changes as much as possible.

1. Has your state opted to participate in the SSTP? What is the impact to the company? Can the company expect to change the way it collects and remits sales and use tax, differently than the current laws and regulations?
2. If the SSTP takes effect at some time in the future, what is the impact to the company? Can the company opt to collect and remit sales and use tax as if the SSTP were in effect now?

My firm is currently in the process of making application to obtain the necessary permits or license in your state in order for the company to properly collect and remit sales and use tax as necessary. Based on the information provided in this letter, please make a determination of the questions raised. If there are any questions concerning the operations of this company, please contact me

## **DEPARTMENT'S RESPONSE**

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail. A "sale at retail" is any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. See 86 Ill. Adm. Code 130.101 and 130.201.

The legal incidence of the Retailers' Occupation Tax falls on the seller, who generally reimburses it by collecting Use Tax from its customer. A purchaser is liable for the Use Tax and is required to pay Use Tax to the seller or directly to the Department. See 86 Ill. Adm. Code 150.130. The retailer must remit the Use Tax that he collects to the Department. However, since the Retailers' Occupation Tax and Use Tax work together in a complementary manner, the retailer may reduce the amount of Use Tax he must remit by the amount of Retailers' Occupation Tax (if any) that he is required to and does pay to the Department with respect to the same sale.

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For information regarding sales of food and medical products, we refer you to the Department's regulation, "Food, Drugs, Medicines and Medical Appliances," at 86 Ill. Adm. Code 130.310. For information regarding shipping and handling, take a look at 86 Ill. Adm. Code 130.410 and 130.415. You may also want to take a look at letters such as the Department's General Information Letter ST 03-0193.

You have mentioned several types of incentives such as company product or other tangible personal property, free admission to events, travel vouchers and gift certificates. We hope the following is helpful.

We do not have enough information to provide specific guidance regarding the various kits. We do not know whether these materials will be resold, used by the independent contractor, or given away as samples. We do not know how the billing works. For resale situations we refer you to 86 Ill. Adm. Code 130.1405 regarding "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale."

The Department's regulation at 86 Ill. Adm. Code 150.305(c) provides that in a gift situation, although the donee of the gift is not a taxable user, the donor who purchases the property and gives it away in Illinois makes a taxable use of the property when making such gift. However, if a donor sends a gift directly from out-of-State to a donee in Illinois for the donee's use, no Use Tax is owed.

Intangible personal property is not subject to sales tax. See 86 Ill. Adm. Code 130.120. An admission ticket that represents the right to attend an event is nontaxable, because it represents an intangible. However, when an admission ticket entitles a customer to food or drink in addition to attendance at an event, it is subject to tax. See 86 Ill. Adm. Code 130.2145.

The sale of airline tickets is not a sale of tangible personal property and is not subject to the Retailers' Occupation Tax.

There is no tax at the time a gift certificate or money order is sold because there is no sale of tangible personal property. These items are an intangible. However, when the gift certificate is redeemed, tax is due on the selling price of the item purchased, whether partially or wholly funded by the gift certificate.

In some cases independent distributors sell your products. The relationship between your company and the distributors may determine whether your company has nexus. If you sell your product to the distributors for resale and they then sell the product in Illinois, the distributor is the Illinois retailer and your company, based upon this contact alone would most likely not have nexus with Illinois. However, if the distributors sell the product in Illinois on your behalf, then you are the retailer and you would have nexus with Illinois requiring you to collect and remit tax on your sales.

When a seller of tangible personal property registers with and obtains a Certificate of Registration from the Illinois Department of Revenue, it gains the right to sell its products at retail in the state of Illinois and in turn, assumes the duty to file returns and remit the tax collected on those sales. In the event a seller registered with the Department sells its products to an independent distributor for the purpose of resale, a Certificate of Resale must be obtained from the distributor in order to be relieved of the duty to collect and remit the sales tax on the products purchased for resale. The requirements for obtaining Certificates of Resale are provided in the enclosed copy of 86 Ill. Adm. Code Section 130.1405.

Manufacturers, importers or wholesalers may, however, enter into an "agency agreement" with the Department, whereby they register, file returns and remit sales tax on behalf of their independent distributors. The Department's regulation, "Filing of Returns for Retailers by Suppliers Under Certain Circumstances," at 86 Ill. Adm. Code Section 130.550, explains how to enter into such an agreement. Under this type of agreement, the manufacturers, importers or wholesalers sell their products to the distributors and collect tax from the distributors based on the selling price of the products to the ultimate consumer. The tax is not calculated on the selling price to the distributor, but rather the applicable tax is calculated and collected based on the selling price of the product at retail. Under such an agreement, the independent distributor is not required to register with the Department, file a return and remit the tax because the manufacturer, importer or wholesaler has assumed those duties.

An independent distributor that agrees to allow the manufacturer, importer or wholesaler to register and remit taxes on its behalf should keep a copy of the agency agreement as proof that it is relieved from the duty to register and remit taxes on products sold at retail. A distributor may opt out of the agency agreement when the distributor wishes to register and remit its own taxes.

Illinois has not enacted any of the substantive provisions of the Streamlined Sales and Use Tax Agreement. No Streamlined Sales Tax Project compliance legislation is currently pending.

If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote  
Associate Counsel

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